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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Orrick, Judge

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
VS.)	NO. CR 17-334 WHO
)	
Christian Lopez,)	
)	
Defendant.)	
_____)	

San Francisco, California
Monday, March 12, 2018

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported By: Vicki Eastvold, RMR, CRR
Official United States Reporter

Monday - March 12, 2018

2:00 p.m.

P R O C E E D I N G S

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THE CLERK: And we're here for criminal matter 17-334, USA versus Christian Lopez. Counsel, please come forward and state your appearance.

MR. VIEIRA: Good afternoon, Your Honor. Chris Vieira and Randy Leonard on behalf of the United States.

MS. MOEEL: Good afternoon, Your Honor. Shaffy Moeel for Christian Lopez who's before Your Honor in custody.

THE COURT: All right. So we have several motions and a few other things to talk about.

So the first thing I'm going to hear is the severance motion. And here's what I think about this.

I don't think there's a problem with joinder under Rule 8. I am concerned about prejudice under Rule 14. And my understanding is that Mr. Lopez is going to testify, if he can, as to the entrapment defense; that he wouldn't be able to put on that defense effectively without testifying, but does not want to testify with respect to the threats and the witness tampering.

And the prejudice -- so I see substantial prejudice there. And I'm not sure I agree with the -- actually, I'm kind of sure that I don't agree with the government's argument that those

1 statements would come in anyway. So that's what I really want
2 to hear, Mr. Leonard, from you is why would it be admissible
3 for the witness to testify with respect to the tampering.

4 **MR. LEONARD:** Well, I think, Your Honor, we have to
5 see how it would really play out in the case, right? And
6 that's why I made the point in the motion that the argument
7 sounds one way when we sort of keep it in the theoretical, but
8 when we get down to the facts I think it plays out quite
9 differently.

10 And, in fact, the case that the defense cited for the
11 proposition you could testify to one and not the other rejected
12 that argument because by -- in that case, and I think it's the
13 same case here -- by testifying -- by attempting to testify,
14 I'll say -- on just a certain set of charges -- let's say on
15 the Counts 1 through 3, the drug distribution and conspiracy
16 charges -- that could potentially open the door to questions
17 about actions -- other bad acts.

18 One of those other bad acts, from the government's
19 perspective, is really a highly probative one, says the Ninth
20 Circuit, and that is an act of solicitation or intimidation of
21 a potential witness on those counts. That's very -- that's
22 highly probative 404(b) evidence of consciousness of guilt.

23 **THE COURT:** But it seems more likely to me that -- or,
24 certainly plausible to me -- that Mr. Lopez was angry for being
25 entrapped. That's what his theory is. So while I see what the

1 government's perspective is, and it could be -- you might be
2 right, but it's also -- if you were entrapped you'd also be
3 really angry. It's still a crime. It's still something you
4 can put on. But it's just a different -- it just puts it in a
5 different place.

6 So then the question is, can he put on the defense that he
7 has for entrapment without being able to testify?

8 **MR. LEONARD:** Well, then, Your Honor, I think that's
9 all the more reason why the counts should be joined. Because
10 if his argument is that I was just angry for being entrapped,
11 well, then, he would have -- he in his own testimony would be
12 talking about those phone calls. Or, those phone calls would
13 be highly probative for both the government's case and the
14 defense's case. Because the defense would be saying, This is
15 proof that I was entrapped. I was so frustrated that I was
16 entrapped. And the government is saying, Well, no, on the
17 other hand, this is proof of your own consciousness of guilt.

18 And more than that, it's proof that you didn't have the
19 lack of predisposition. Stated differently, you did have a
20 predisposition because here you are, after finding out you've
21 been quote/unquote entrapped, soliciting a beating for someone
22 who's -- for a witness who's going to participate in that case.

23 So, again, I think if we get down into the weeds of this
24 case we realize that no matter how you slice it this is
25 relevant and this is fair ground for cross-examination.

1 And I think Your Honor's example is a perfect example. If
2 his argument is that, I have been entrapped, and I did this --
3 or, excuse me, this phone call is evidence that I've been
4 entrapped -- well, then, of course, it's fair game. Because
5 he's presenting it --

6 **THE COURT:** But he's not going to say that. But it
7 seems logical to me that even though you've got a theory about
8 how it comes in, he's not going to be in a -- he does not --
9 first of all, he's going to -- he's not going to testify about
10 it because he doesn't want to admit that he said it in the
11 first place; which is a problem. But he would be totally
12 blocked out of his ability to assert entrapment if he isn't
13 able to testify about the circumstances that happened before he
14 was indicted. And that's really what the --

15 And you are entitled to put on -- if he puts on his
16 entrapment defense, you're entitled to put on prior acts and
17 those sorts of things. But I don't think -- that's just my
18 concern. And I didn't see a case that was helpful to you in
19 that regard.

20 **MR. LEONARD:** I want to make sure I'm following you.
21 So is it the Court's position if he wanted to testify on
22 entrapment to just charges 1, 2 and 3, to the drug
23 distribution, he might have an argument that that should be
24 severed from Counts --

25 **THE COURT:** From 4, 5 and 6.

1 **MR. LEONARD:** Your Honor, respectfully, I think the
2 Court is -- I'm kind of seeing this whole discussion as making
3 our point. Because if he does present that entrapment defense,
4 then in a severed trial in which Counts 4, 5 and 6 are not on
5 trial, that evidence would nonetheless be admissible because he
6 has now presented himself as someone who did not have the
7 predisposition to commit this crime.

8 So it's -- so the second -- I don't want to call them
9 prior acts because they happened after the fact. We often talk
10 about 404(b), but it's actually other acts evidence. So these
11 other acts of a witness intimidation would be relevant. Let's
12 set aside -- let's set aside his entrapment defense. Even if
13 he didn't have an entrapment defense I believe it's relevant.
14 I believe the Ninth Circuit countenance is this approach that
15 other -- excuse me -- the phone call is evidence of
16 consciousness of guilt.

17 And I want to find the case so I can have it here. It is
18 *Meling. United States versus Meling.*

19 **THE COURT:** Yeah. I read *Meling* this morning.

20 **MR. LEONARD:** So even if he didn't raise the
21 entrapment defense, we would say this is very probative
22 relevant evidence of his consciousness of guilt.

23 **THE COURT:** But that's exactly my problem with it.
24 I'm not sure that it is evidence of consciousness of guilt. It
25 may be consciousness of anger that he got entrapped. So that's

1 -- it's not that he's disputing the fact that he was there and
2 that he did the drug deal. I think his whole defense is going
3 to be, I did it, but I got tricked into it by the CI.

4 And so that's not consciousness of guilt. So then the
5 threat isn't consciousness of guilt, it's just anger.

6 **MR. LEONARD:** Well, I think that's one reading of it,
7 Your Honor.

8 **THE COURT:** Right. And yours is another. But that's
9 why I think it's safer to allow the severance and allow the
10 entrapment defense to go forward.

11 **MR. LEONARD:** Well, here's the problem with doing
12 that, Your Honor. I think it really frustrates the objective
13 of Rule 8 for judicial economy. Because I think the Court
14 would certainly agree with this proposition, and that is --

15 **THE COURT:** I definitely agree with that it's not -- I
16 would prefer not to try this case twice. I totally get that.
17 And I do think it's proper -- I don't think -- I think the
18 joinder itself was proper. It's just the circumstance is
19 prejudicial under Rule 14.

20 Let me bring -- since I've been carrying the ball for
21 Ms. Moeel today, let me have her correct any misstatements that
22 I've made.

23 Hello, TK. How are you?

24 **THE OFFICER:** Good, Judge. How are you?

25 **THE COURT:** Good to see you.

1 So correct any misunderstandings that I have and lay out
2 what you think.

3 **MS. MOEEL:** Well, Your Honor, I appreciate your Rule
4 14 analysis and I agree with it and I'll tell you why.

5 I do think -- and I won't beat a dead horse since I'm sort
6 of winning, but I do believe that the Rule 8 joinder is still
7 problematic for the reasons I've identified. But particularly
8 for the reasons identified in the *Jawara* case. I mean, *Jawara*
9 went the other way. They found that Rule 8 was properly --
10 that the counts were properly joined, but there wasn't
11 prejudice.

12 Here -- and again, we have to look at just the allegations
13 in the indictment under the Ninth Circuit precedent. And what
14 the government's done in their response in arguing that Rule 8
15 joinder is proper is they've argued a lot of the underlying
16 facts.

17 But in the same way that in *Jowara* we don't have the same
18 statute set -- I'm talking about the drug charges kind of
19 contrasting with the tampering and solicitation charges. Not
20 the same statute, not the same elements. Not the same victims.
21 Not the same temporal proximity, neither the same location.

22 So all the factors identified looking at them on the face
23 of the indictment, the witness identified for the tampering is
24 not alleged in the drug charges. All those factors go toward
25 there not being proper joinder looking at just the face of the

1 indictment in the first place.

2 But we do use Rule 14 as a sort of secondary analysis, not
3 just a backup, but its own individual inquiry. And I agree
4 with the Court that under Rule 14 there is significant
5 prejudice for all the reasons cited by the Court.

6 Now, with respect to the predisposition, and I think this
7 case is going to come down with significant argument and future
8 litigation regarding what predisposition evidence comes in, but
9 I think the government is incorrect that there is any probative
10 value as to predisposition for the later charges that happened
11 after the drug crimes were committed and the entrapment defense
12 is available.

13 Predisposition arguments and the evidence that is allowed
14 to be introduced ends when the crime charged, and when
15 Mr. Lopez was potentially entrapped ends. Which is, when the
16 drug crimes are completed, anything that happened before that
17 the government is potentially able to bring in as
18 predisposition. Not what happened in the future. Not what
19 Mr. Lopez does in the jail, for example. Not what kinds of
20 things he might say in a jail phone call when he's in custody
21 for this offense.

22 So there's not -- you know, not the day before trial.
23 None of those would come in because they happened after the
24 drug charges.

25 So to the extent the government would want to bring the

1 tampering and solicitation charges in to prove predisposition,
2 that's just not available to them.

3 Number two, as Your Honor pointed out, consciousness of
4 guilt is not an issue here because Mr. Lopez is admitting to
5 the basic elements of the crime. He's admitting that he did
6 the thing; and there's a legal justification for it in the form
7 of entrapment. So consciousness of guilt to the extent they're
8 relying on that is not available here, nor is any other basis
9 for 404(b), intent, motive, plan, opportunity. All of those
10 things, again, we are looking at when the drug crimes happened.

11 That Mr. Lopez at the time of the drug crimes had some
12 premonition, or that the government had a crystal ball to know
13 what he would have done in the future, nothing that happened
14 after that can explain any intent, motive, opportunity for the
15 drug crimes.

16 So, again, it doesn't make sense that that drug crime --
17 the tampering or solicitation charges would come in under that
18 theory, either.

19 And, Your Honor is right; fundamentally, this is a
20 constitutional problem. The exact type that Rule 14 is meant
21 to protect somebody like Mr. Lopez from. He must testify, in
22 my view, and I think that's borne out by the case law, to show
23 that the government did not entrap him. He has to present some
24 evidence of why to get the instruction in the first place.

25 And that defense is plainly not available to him, and we

1 haven't given notice of that with respect to the tampering and
2 solicitation charges.

3 So he either can testify to get his entrapment of the drug
4 charges, or choose not to self-incriminate in honor of his
5 Fifth Amendment privileges to the other charges. And so he's
6 in this bind. He cannot do both. He cannot have both the
7 Fifth and Sixth Amendment right to present a fair defense and
8 protect his ability under the Fifth Amendment to not
9 self-incriminate. And that's why I do agree that Rule 14 does
10 support a severance of these charges.

11 **THE COURT:** I am going to sever, Mr. Leonard. And so
12 we'll do the first three counts.

13 So then the next question, I think, is --

14 Did you want to say something?

15 **MR. LEONARD:** Oh, no. Please.

16 **THE COURT:** The next question is how do we do this in
17 the most efficient way possible? Because I like to do things
18 efficiently, Mr. Lopez, but protect your rights. And so I've
19 got to protect your rights first, but then I want to be
20 efficient. And the evidence that the government's going to put
21 on now they would have to put it on twice, basically, which I
22 totally understand and I'm not very happy about. But that's --
23 it's a short trial so it's not going to -- it will just be more
24 trial practice.

25 **MR. LEONARD:** In that respect, Your Honor, we would

1 like some clarity on the admissibility of what's now 404(b)
2 stuff. And if I could just respond briefly to the 404(b)
3 argument Ms. Moeel made.

4 We still have to prove our case. And 404(b) evidence is
5 evidence. It's admissible evidence. And we have to prove
6 every element to every juror. So just because he might be
7 conceding certain facts or certain arguments, we still have to
8 prove the case. And 404(b) evidence is admissible to do that.

9 **THE COURT:** We'll go through all the motions *in limine*
10 and we can talk through these things. And if there's any issue
11 -- we'll solve the issues by the time we leave here.

12 **MR. LEONARD:** Yes, sir.

13 **THE COURT:** So one thought that I had had, but I'm not
14 sure that it works, at the end of the day. One thought that I
15 had was we use the same jury. That we try the first three
16 counts. And they decide what they -- and Mr. Lopez testifies.
17 Doesn't say anything about the threats.

18 And then that jury has already heard the evidence and then
19 comes back and does the second thing. Not sure that that
20 works. And I would only do that if the defense was in full
21 accord with doing it. I can see some reasons why that may not
22 be a good idea.

23 Looks like you're shaking your head.

24 **MS. MOEEL:** Yeah, Your Honor. Again, I respect
25 judicial economy as much as the next person as a member of this

1 bar, but I do, off the top of my head, see some problems with
2 that. So I would not be willing to concede to that for
3 Mr. Lopez.

4 **THE COURT:** So the second thing that I was thinking
5 about, and it depends on how many people we call as jurors, is
6 maybe we do this -- maybe we pick two juries on the 2nd. And
7 we do -- we have the -- impanel the first one, and then have
8 the second trial go the following Monday. And if we don't do
9 it that way, we'll pick another jury the following Monday. But
10 we're going to do this as close together as we can to
11 inconvenience witnesses the least and so on.

12 **MS. MOEEL:** Sure. Your Honor, our request would be
13 just to pick the jury the following Monday.

14 **THE COURT:** I'm not sure how many people we have
15 called. Is there a reason why you're --

16 **MS. MOEEL:** Well, I'm just thinking through the
17 mechanics of it. So when we have an attorney-led *voir dire*, we
18 would be talking potentially about issues that could reveal the
19 bias of the witnesses as to the particular sort of themes in
20 the case (sic). That might again reveal to one jury or the
21 other some of the evidence that has been excluded.

22 **THE COURT:** That's probably right.

23 **MR. LEONARD:** I think we agree with Ms. Moeel on that
24 point.

25 **THE COURT:** Okay.

1 **MR. LEONARD:** If it's going to be a very robust
2 helpful *voir dire*, we'd like to get into some of the facts of
3 the case.

4 **THE COURT:** Yes. Absolutely. All right. So all my
5 bright ideas are for naught. That's fine.

6 So let's go onto the motions *in limine*.

7 So starting with the government's. I didn't see a
8 response by the defense.

9 **MS. MOEEL:** Your Honor, I'm so sorry. I did not file
10 a response, and I apologize for that. I was -- we had -- sort
11 of had a shortened time frame based on the timing of the
12 indictment that came down, and I focused on filing the motions
13 to bifurcate and so I did not get around to filing the
14 opposition. And I really apologize.

15 **THE COURT:** I'm going to run through my reaction to
16 each of them and then I'll let you respond.

17 Number one, the impeachment of the confidential informant
18 being confined to the Rules of Evidence. I agree with that. I
19 don't know there's much more to be said with respect to that.
20 And I think particularly in that regard the government is
21 concerned about cross-examination on specific instances of past
22 conduct; and I agree with the government.

23 Second, the protection of the informants by not mentioning
24 his name in public filings and prohibiting the use of
25 electronic devices while he testifies is fine.

1 Third, no reference should be made by the defense to
2 punishment or immigration consequences.

3 The opening -- number four, the opening should conform to
4 the evidence that's expected to be admitted.

5 Five, the defense has reciprocal obligations.

6 Six, the defense shouldn't create surprise defenses.

7 Seven -- I think this already happened -- which was the
8 pre-trial offer of proof for affirmative defenses, which is
9 entrapment.

10 Eight, give an entrapment instruction only when there's
11 sufficient evidence.

12 That's -- all of these things are sort of general rules,
13 which are fine. Or, are fine and appropriate.

14 With respect to eight, there's -- if entrapment is going
15 to be -- if Mr. Lopez is going to testify, he will undoubtedly
16 open the door to character evidence and bad acts evidence. And
17 we'll talk about the gang evidence in a moment and maybe you'll
18 enlighten me on some of that.

19 So with number nine was the bad acts. And one thing --
20 two things were mentioned by the government. One is past drug
21 sales, which would seem germane. The other one is membership
22 in the gang that sells drugs. And I want to talk about what
23 that evidence might look like in just a moment.

24 Ten, was to exclude witnesses except the case agent, which
25 is fine.

1 And then eleven, that the defendant's out-of-court
2 statements would be admissible. Which is true. And then the
3 defendant couldn't cherry pick other pieces of those things
4 without his -- unless it was appropriate through his testimony.

5 So those were my reactions.

6 Did you have -- is there any one that you wanted to speak
7 to, Ms. Moeel?

8 **MS. MOEEL:** I did want to speak, please, to the
9 opening the door with respect to the entrapment instruction --

10 **THE COURT:** Okay.

11 **MS. MOEEL:** -- and the parameters of that. Your
12 Honor, it's my -- I think -- so what I've received is a 404(b)
13 notice letter. That's what it's called. Which lists out in
14 bullet point form the things that the government believes it
15 can introduce if Mr. Lopez opens the door by -- essentially by
16 testifying, presenting the entrapment defense.

17 And I think that -- well, and with respect to that, the
18 404(b) notice does not actually indicate what 404(b) grounds
19 those particular pieces of evidence go to show. So for
20 example, there is no -- the government has not offered any
21 information by way of whether a particular misdemeanor
22 possession for possessing fireworks, for example, whether that
23 goes to intent, plan, opportunity or motive to commit the drug
24 distribution charges.

25 So I don't believe the law regarding predisposition on

1 entrapment is everything under the sun suddenly becomes
2 admissible if a defendant argues that he has been induced
3 unfairly to commit the crime.

4 What I believe the state of the law is is that what goes
5 -- what evidence shows that he's predisposed to commit the
6 charged offenses? So whether a possession of the fireworks,
7 for example, goes to show he's predisposed to committing the
8 drug charges. So I don't believe that that's the case.

9 And then there are some other sort of bullet proof --
10 bullet pointed -- distinct offers of 404(b) that I think are
11 also problematic. And I don't know whether to go through them
12 here at this time or -- I don't know. I guess we can go back
13 and forth.

14 But that's sort of my issue.

15 With respect to the two identified here and that I did
16 discuss at least in my motions *in limine* with regard to gang
17 membership and drug sales, I would like to talk about that.

18 The government has also indicated in an expert letter, or
19 an expert witness notice that I received regarding the chemist,
20 one sentence regarding if the defendant offers entrapment as a
21 defense then we will call a particular officer from the South
22 San Francisco Police Department to discuss -- and I think it
23 was literally just this: Mr. Lopez's membership in the Cypress
24 Park Locos gang. And two, the officer's familiarity with that
25 gang and his familiarity that the gang sells drugs.

1 So I think the government's theory here is clear; and I
2 think that is not appropriate either as expert notice, for one,
3 because I've indicated that Mr. Lopez is going to testify, he's
4 presenting this entrapment defense. I've told them for months.
5 So, one, I don't have anything with regard to how this expert
6 is an expert, and so I can't sort of -- I can't oppose that
7 with some specificity.

8 But the membership in the gang, again, is hard to argue
9 against without more specificity, but I think that -- I just
10 still have no discovery on it. I don't know what it means for
11 a person to be a member of this gang. I don't know if they
12 have a document, Mr. Lopez's statement saying he's a member of
13 the gang, or if they're just going to have an officer's opinion
14 that Mr. Lopez is a member of the gang based on where he lives.

15 So for one thing, it's hard for me to argue against it
16 because I don't know what the discovery, what the evidence,
17 actually would be. But if it's simply that, that an officer is
18 going to testify that he believes Mr. Lopez is in a gang and
19 he's just going to offer his opinion about what that gang does
20 and that that gang sells drugs and that, therefore, Mr. Lopez
21 has a predisposition to sell drugs when he's never been
22 arrested for selling drugs, never been convicted for selling
23 drugs; I find that to be extremely problematic. Not probative
24 at all. Because it's not specific to Mr. Lopez. And highly,
25 highly prejudicial. So I would have a problem with those

1 things coming in.

2 **THE COURT:** Mr. Vieira.

3 **MR. VIEIRA:** Thank you, Your Honor. So I just want to
4 address kind the notice issues first.

5 At this point, the government is not intending on calling
6 Officer Fukushima during its case in chief. And the Federal
7 Rules of Evidence -- or, criminal procedure, I'm sorry -- would
8 only require an expert disclosure for an expert that the
9 government is intending on calling in its case in chief. Out
10 of an abundance of caution, and to see exactly how Mr. Lopez
11 might open the door to such testimony during his anticipated
12 testimony, our current plan is to wait to put that expert on
13 during our rebuttal case.

14 As far as information that that officer can provide, he --
15 there is a document in discovery that I will produce to defense
16 today. Basically, a writeup from that officer who opines based
17 on a variety of criteria -- the individual Mr. Lopez has been
18 arrested with; has been seen hanging out with; photos including
19 gang indicia, et cetera, I won't get too much into the
20 details -- that Mr. Lopez is a member of the Cypress Park Locos
21 gang. And, in fact, the co-defendant in this case, Cristian
22 Rubio, is also a validated member of that gang, as well.

23 And then as far as additional testimony we would expect
24 the officer to testify that one of the gang's primary
25 activities, ways of making money, et cetera, reasons for

1 controlling territory and defending territory, is to sell drugs
2 within that territory and that members of the gang would be
3 expected to at least participate in activities that further the
4 gang's objectives, including selling drugs.

5 But that is not something that we intend at this point on
6 offering during the case in chief just simply because I think
7 it is -- I think, as defense counsel has recognized, it is we
8 believe highly probative evidence in this case, but at the same
9 time it's also difficult evidence to be brought against a
10 defendant. There's weights on both sides.

11 So we're, in abundance of caution, currently planning on
12 holding off and seeing kind of exactly how wide the door has
13 been opened to that type of evidence. Because we would agree
14 that evidence is not admissible absent the door being opened.

15 **THE COURT:** Well, right. You know that the door's
16 going to be open somewhat.

17 **MR. VIEIRA:** In some way.

18 **THE COURT:** So I would encourage you to take a look,
19 if you haven't, at the order that I made in the *Williams* case
20 back in about 2016 or 2015 on gang evidence. There's a gang
21 expert who was going to testify who was a member of the gang
22 task force who knew a lot about Western Addition gangs and was
23 a good and credible witness, but he had not had any other -- he
24 did not have other expertise with respect to gangs.

25 He didn't have expertise beyond the gangs in the Western

1 Addition. He didn't have special education, training, other
2 sort of expertise. And I pretty severely limited what he was
3 able to testify to. He could testify about -- this is from
4 memory and from what he ended up testifying to -- but he could
5 testify to slang; he could testify to, I think, tattoos; and I
6 think the geographic location of gangs in the Western Addition.
7 But he could not then go further to say: And I know this guy
8 is in a gang. I know what this gang does. That had to be
9 proven by the actual evidence of what they did.

10 You can't put on an expert to say -- to prove the crime,
11 basically. And that's -- other judges in our district have, I
12 think, done the same thing. Judge Illston did the same thing
13 and Judge Alsup did the same thing.

14 So I would look carefully at that as you're thinking about
15 what's going to be germane and not.

16 **MR. VIEIRA:** And we can do that, Your Honor,
17 certainly. I believe this witness also -- I vaguely, vaguely
18 recall the order that the Court is referencing. And I'm not
19 sure what the witness's qualifications were in that case, but I
20 can say in this one, this witness does have at least some
21 degree of personal knowledge regarding the defendant and --
22 this defendant specifically -- and the gang. I'm not sure if
23 the witness in the *Williams* case had that as well, but we can
24 take a look at that order.

25 **THE COURT:** Take a look. What I would hate to have to

1 do is to stop the trial in the middle. So if there is -- so I
2 would think -- think through what you are likely to want to put
3 on in light of the expected testimony and then disclose it to
4 the defense. And if we need to have some sort of a pre-trial
5 *Daubert* on this a couple days ahead of time, or at least some
6 listing of the expected opinions --

7 And maybe that's the -- that's what I'm going to ask you
8 to do.

9 Why don't you make a list of the opinions that you would
10 expect the witness to give and the witness's background. And
11 what if you did that by the 26th of March?

12 **MR. VIEIRA:** That's fine.

13 **THE COURT:** And then if there's a concern about that
14 testimony why don't you file a notice on the 28th.

15 **MS. MOEEL:** Sure.

16 **THE COURT:** And then I'll decide what to do. And
17 maybe when I get off the bench and I'm thinking totally clearly
18 we might have some sort of a hearing on the 29th if there's the
19 need to do that. Or we may be able to just do it in an
20 afternoon on the 3rd, more likely. Okay?

21 **MS. MOEEL:** Yes. And, Your Honor, I guess this goes
22 without saying, but you're not making necessarily any finding
23 or ruling on the probative value of the testimony or the
24 admissibility as an initial point, are you? I mean, I think --

25 **THE COURT:** Well, if there was a solid link between

1 Mr. Lopez's past conduct -- I don't know what, Mr. Lopez, your
2 past is so I'm just making things up right now.

3 But if there was a bunch of evidence of Mr. Lopez selling
4 small amounts of narcotics, but he'd never been arrested for
5 it. Or, he'd been arrested, but they'd been tossed. But there
6 was some sort of significant history; and that he was a member
7 of a gang that does a lot of drug selling; and he was connected
8 with several other people in the gang who were involved in
9 that. The more evidence of that sort that there is that comes
10 in legitimately, the more admissible it's going to be.

11 **MS. MOEEL:** Okay.

12 **THE COURT:** And if there's -- if it's just scattered
13 information of different sorts then I wouldn't be inclined to
14 do it.

15 **MS. MOEEL:** Okay. Great. And I guess I will make
16 this a more formal written request, but if it's true that this
17 officer has had significant personal contact with Mr. Lopez,
18 then we would be requesting any of Mr. Lopez's statements that
19 he may have made to that officer that form the basis of his
20 opinions. Because we don't have anything like that right now.

21 **THE COURT:** All right.

22 **MR. VIEIRA:** If there are statements -- or, if
23 anything's written or anything like that, we can provide them.
24 I'm not sure that they're, given the nature of the police work
25 and contact, I don't know that there's anything as formal as a

1 report.

2 **THE COURT:** It does seem to me -- you know the case
3 better than I do -- but it looks like this whole case is going
4 to come down to entrapment. That everything -- I'd be
5 surprised if you're not going to stipulate, Ms. Moeel, to the
6 purity and those sorts of things. Maybe you aren't. But it
7 seems to me that it's just coming down to that issue.

8 So you know what evidence you're going to need in
9 rebuttal, and so disclose it. And if it's all resting on the
10 officer, then fine. But if there are statements, we ought to
11 get them out so that there aren't any surprises.

12 Okay. Anything else on that? On the government's motions
13 *in limine*?

14 **MS. MOEEL:** No, Your Honor.

15 **THE COURT:** So on the defense motions *in limine* -- so
16 what about the -- I just made an offhand comment about weight
17 and purity. The stipulations that the government mentioned in
18 their brief and motion that you've been concerned about
19 agreeing to because, I guess in part, what was going to happen
20 with the severance, what's your perspective on those now?

21 **MS. MOEEL:** Your Honor, I was -- it's hard because I
22 was sort of raised in a different district that had different
23 customs. I'm from the Southern District of California where I
24 was a federal public defender. So my belief is that where the
25 government is not giving Mr. Lopez any benefit to stipulate to

1 any particular aspect of the trial or an element of the offense
2 that they have to prove to a jury beyond a reasonable doubt,
3 that Mr. Lopez will not stipulate.

4 **THE COURT:** Well, I can't force you to.

5 All right. So that tells you where you need to be with
6 your witnesses.

7 We've talked about the gang. Testimony. With respect to
8 documents that haven't -- exhibits that haven't been produced,
9 I set a date of March 23. If there's anything else that the
10 government expects to use or with respect to the affirmative
11 defense, they ought to be produced to each other by the 23rd.

12 **MR. VIEIRA:** And for clarification, Your Honor. On
13 that, would that be exhibits that the government intends to
14 admit? Because we are currently preparing transcripts for
15 audio discovery, but those transcripts will not ultimately be
16 admitted because they're English language.

17 **THE COURT:** Fair enough. And obviously, as soon as
18 you're able to get those to the defense, that's fine. But, no,
19 I'm talking about something that is new; and absent good cause
20 I'm not going to allow it unless it's been exchanged by the
21 23rd.

22 **MR. VIEIRA:** And specifically -- well, I guess those
23 transcripts may not be prepared by the 23rd, but --

24 **THE COURT:** And I'm excluding the transcripts because
25 the recordings the defense already has.

1 **MR. VIEIRA:** So just exhibits that the government
2 would seek to admit into evidence need to be produced by the
3 23rd. And conversely, exhibits the defense, I guess, would
4 want to.

5 **THE COURT:** For the affirmative defense.

6 **MR. VIEIRA:** For the affirmative defense. All right.
7 Thank you.

8 **MS. MOEEL:** Entrapment is not an affirmative defense.
9 So you mean just basically in our case.

10 **THE COURT:** In your case. In your case.

11 **MS. MOEEL:** Okay.

12 **THE COURT:** Thank you. There was -- number 3 we've
13 talked about, which was other acts, which can come in.

14 **MS. MOEEL:** Your Honor, I guess, if we may, there are
15 other "other acts" evidence that the government has noticed in
16 its letter in bullet point format.

17 So, for example, with respect to Mr. Lopez's misdemeanor
18 priors for possessing an illegal -- fireworks, and a
19 misdemeanor offense for carrying a concealed weapon. So -- and
20 again, they've indicated that that's something they would only
21 use in rebuttal evidence. Or, not in their case in chief, I
22 suppose, is more what they've said.

23 So is this something -- is this something better for me to
24 just kind of very specifically --

25 **THE COURT:** Helpful for me to see the document, for

1 you to identify what the problem is or what the concern is.

2 And talk about it with Mr. Vieira.

3 **MS. MOEEL:** All right. I got the notice --

4 **THE COURT:** Then bring me what the problem is and I'll
5 deal with the problem.

6 **MS. MOEEL:** We'll do that. I'll do that.

7 **THE COURT:** Okay. So there wasn't an opposition to
8 number is 5, 6, 8, 10, 11, and 12. So I'll grant that.

9 With respect to the admissibility of statements on the
10 audio recording; if there's a problem with that -- and I guess
11 this all depends on when the transcripts are prepared -- but
12 I'd like to see those in advance so I don't have to deal with
13 them on the fly. So if the -- it depends when the transcripts
14 are prepared. But hopefully if they're prepared by March --
15 I'd love to see them by March 26, annotated with whatever the
16 defense's objections are to them. If that's not possible, then
17 I'd like to see them as soon as I'm able to see them.

18 **MR. VIEIRA:** And, Your Honor, I don't think the
19 government would be admitting anything in the phone records for
20 the truth of the matter asserted other than, you know, the fact
21 that it was asserted, for instance. I can get you X amount of
22 drugs by X date, kind of thing. Don't really care if that's
23 true or not necessarily, but the fact the offer was being made,
24 for instance, would be kind of appropriate.

25 **THE COURT:** So in a conversation with Mr. Lopez. And

1 so I'm inclined, in those circumstances, to allow them either
2 as not hearsay -- as not hearsay for any number of reasons,
3 including context, as long as there are statements by the
4 defendant in there.

5 **MS. MOEEL:** There are other statements that I think
6 are -- that should be also subject to 403 grounds. And the
7 government has indicated some of the statements that Mr. Lopez
8 has made. Even though on the one hand they're saying they're
9 not asserting it for the truth, on the other hand they seem to
10 be arguing with me or in prior correspondence that it does go
11 to predisposition. So I think that -- I think it is best to
12 address them specifically once the transcript --

13 **THE COURT:** Just identify them for me and I'll take a
14 look at them.

15 **MS. MOEEL:** Sure.

16 **THE COURT:** The government's case agent can be present
17 throughout the case. And I think that takes care of all the
18 motions *in limine* that the government -- or, that the defense
19 filed.

20 **MS. MOEEL:** And then number 12, Your Honor, with
21 respect to government witnesses also being subject to defense
22 subpoena unless released.

23 **THE COURT:** I think the government agrees.

24 **MS. MOEEL:** No opposition? Okay. Great.

25 **THE COURT:** All right. So that's -- those are the

1 motions *in limine*.

2 So now, Mr. Leonard, are you satisfied at the moment with
3 what you can do and not do with respect to the 403, 404 issues
4 that we were talking about in the beginning?

5 **MR. LEONARD:** Not entirely, Your Honor. Because I was
6 just thinking through your order again on severance for this
7 purpose. And it seemed as though the Court was saying that in
8 testifying on the severed Counts 1, 2 and 3, the defendant may
9 testify that his statements to an undercover police officer
10 after the fact were proof of his being entrapped.

11 **THE COURT:** So ignore what I said. Because if he --
12 if he testifies about what he said to the undercover after the
13 fact, it's fair game for you to do whatever you want to do.
14 He's not going to -- I don't think he's going to do that.

15 What I was --

16 **MR. LEONARD:** I see.

17 **THE COURT:** -- talking about was, just in my mind as I
18 was reading it, I was trying to put myself into what Mr. Lopez
19 might say about that if he was going to say anything at all.
20 Which he doesn't have to.

21 **MR. LEONARD:** Well, I guess that's where -- that's
22 where I want some guidance. Because it's our position that if
23 he says anything -- if he testifies about anything on Counts 1,
24 2 and 3, his conversation with the undercover officer after his
25 arrest is relevant and admissible.

1 **THE COURT:** I understand that that's your view. It's
2 not mine. I'm really going to draw a line from the time that
3 he was indicted -- the prior acts from the time that he's taken
4 into custody for 1, 2 and 3. Or actually -- yeah. And brought
5 before the indictment. That will be the line that I draw.

6 **MR. LEONARD:** And that is if -- if the door is not
7 opened.

8 **THE COURT:** Unless the door is opened further by
9 Mr. Lopez.

10 **MR. LEONARD:** But that would require something more
11 specific on his part than just testifying on 1, 2 and 3.

12 **THE COURT:** Exactly right. Exactly right.

13 **MS. MOEEL:** And, Your Honor, because here he was
14 indicted June 2017, the first indictment, but he wasn't
15 arrested until some months later, I guess my view would be that
16 the timeline isn't actually up until he was arrested, but
17 really up until the indictment comes down. Or, really, up
18 until -- the dates of the offense, mostly. Because entrapment
19 -- I mean, there wouldn't be anything probative for him to talk
20 about after the crime has already happened.

21 **THE COURT:** Well, that I don't know about. And if
22 he's out and about doing stuff after the act, it would seem to
23 me that would be fair game.

24 What I think would not be fair game is the conversation
25 with the undercover.

1 **MS. MOEEL:** Right. Okay. There's no allegation that
2 he was --

3 **THE COURT:** I would stop there while you're ahead on
4 that point.

5 **MS. MOEEL:** Okay. Got it.

6 **MR. VIEIRA:** And I would just say for the record, Your
7 Honor, there were conversations that Mr. Lopez had with an
8 undercover officer in the days following the October 2016
9 methamphetamine sale where he solicited the officer, basically
10 asked him if he wanted to buy more. And the government would
11 be seeking to introduce that directly on the point of
12 entrapment.

13 **THE COURT:** I agree. I agree.

14 With that, let's talk about a couple of trial mechanic
15 things so we're all clear on that.

16 The trial days will be from 8 to 1 except for on the day
17 that we pick the jury. And that day I think we should just go
18 all the day. The jurors will be here, they won't know what to
19 expect as far as timing's concerned. We might as well use a
20 full day and get some -- make some progress on the trial. So
21 that would be my anticipation.

22 And then I think it's -- and I may tell them that they
23 should plan on Friday, at least, to be available for the full
24 day. Because either they'll be in a place to be deliberating
25 or we could make use of the full day. I don't have any

1 calendars on Friday, so --

2 So that would be my thought about that.

3 The *voir dire* you've agreed on. And that's fine. I'll
4 give it -- I'll give you each about 15 minutes to go further on
5 things. If you're really making headway, I'll let you go a
6 little longer than that. But usually people aren't. So 15
7 minutes seems like plenty.

8 I didn't see a joint statement that describes the case.
9 If you want to get together for something for me to read to the
10 jury, that would be great. And if you have, all you have to do
11 is point it out to me.

12 **MR. LEONARD:** Your Honor, we talked about it, and I
13 think both the government and defense -- please tell me if
14 you've changed your position -- are content with instruction
15 number 2 which is, basically, just a reading of the charges
16 serving as a preliminary statement, if that's okay with the
17 Court.

18 **MS. MOEEL:** Yes, Your Honor. That's fine.

19 **THE COURT:** Okay. That's what we'll do.

20 **MR. LEONARD:** May I ask another mechanical question
21 about *voir dire*, Your Honor?

22 **THE COURT:** Yes.

23 **MR. LEONARD:** That is just simply how you like to seat
24 the *venire* persons? Do you question the entire *venire* or do
25 you cut it off at 30?

1 **THE COURT:** Here's how it works. So there will be a
2 row of chairs in front of the jury box. And then I'll have
3 people come in already pre-mixed. So juror number one will be
4 juror number one. Exactly. And they'll sit on the benches in
5 the same way. So they'll all be sitting, you know, wherever we
6 get to back there. 26, 27, 28, 29, whatever it is.

7 And I will, depending on how many people come in, I'll ask
8 them all to stand up and introduce themselves. You know, the
9 standard five or six questions. And then I will probably
10 question -- I probably won't listen to answers from people from
11 40 on until we know how things are shaking out. Unless it
12 looks like there are going to be a number of cause people.
13 That's my general practice which I sometimes follow.

14 But --

15 **MS. MOEEL:** Okay. So -- I'm sorry. From where your
16 clerk is sitting, is that seat number one?

17 **THE COURT:** Seat number one is actually in front of
18 Thanithia there.

19 Is that right, Jean? Do we do one that way?

20 **THE CLERK:** Yeah.

21 **THE COURT:** So there will be like seven or eight in
22 front, and then where Thanithia is will be the next eight.

23 **MS. MOEEL:** That's eight. And then nine is over
24 there. Then they'll start from that corner on?

25 **THE COURT:** Exactly.

1 **MS. MOEEL:** For our little cheat sheet that I create.
2 Great.

3 **THE COURT:** Then I haven't -- well, I did once. So
4 we'll go through the questions. I'll finish the questions.
5 You will finish the questions. Then we'll meet at sidebar and
6 discuss cause and hardship. And I'll dismiss those folks.

7 I tend not -- almost every time I do not refill the box
8 because you know where people are sitting. You know how
9 they've answered the questions where we were. And I think it's
10 more confusing than helpful to move people around. So that's
11 what I do. And so you'll be then able to exercise your
12 peremptories passing the sheet back and forth.

13 **MS. MOEEL:** Okay. So we do it that way.

14 **THE COURT:** Yeah.

15 **MS. MOEEL:** Great.

16 **THE COURT:** So that's generally how it should work.

17 **MR. LEONARD:** That's helpful, Your Honor. Thank you.

18 **THE COURT:** So is there anything else that we ought to
19 talk about?

20 **MR. LEONARD:** Jury instructions, Your Honor. I think
21 we --

22 **THE COURT:** Looked like you were in great shape on the
23 jury instructions.

24 **MR. LEONARD:** And I think we agreed on all of them.

25 And to be more -- we were a little bit more cautious we put "if

1 applicable" by a number of them. And we can address those I
2 think as we get closer to needing them.

3 **THE COURT:** And everybody's -- we're all set with the
4 beginning ones, so I think we'll be fine. And then we'll just
5 have to decide.

6 So given that we're playing on Southern District of
7 California rules, how long is the -- how long do you think it's
8 going to be to put in this case?

9 **MR. LEONARD:** Well, we wish it could be shorter.

10 **MS. MOEEL:** The chemist is like 15 minutes.

11 **MR. LEONARD:** I'll let -- Mr. Vieira is lead counsel.
12 He knows the case better than I do.

13 **MR. VIEIRA:** I would say, Your Honor, doing a full day
14 on Monday -- and I would anticipate -- I haven't done jury
15 selection in this court, but I would anticipate we'd probably
16 be done early in the afternoon with that?

17 **THE COURT:** Yes. Typically it's -- we'll be able to
18 break for lunch and then start with opening statements.

19 **MR. VIEIRA:** Okay. Okay. So jury instructions would
20 be done before even potentially lunch? Initial jury
21 instructions?

22 **THE COURT:** Or I'll instruct immediately after, but
23 they don't take very long.

24 **MR. VIEIRA:** Okay. So I would think, then, at that
25 point -- and we would go until 4 on that first day? That we

1 would probably get -- probably would not finish with the first
2 witness, but that's going to be a longer witness. I think
3 we'll probably get through -- the government might rest on
4 Wednesday.

5 **THE COURT:** All right. And then maybe --

6 **MS. MOEEL:** Our case would be no more than -- well,
7 depending on -- not including cross, I think it would be no
8 more than four hours total.

9 **THE COURT:** All right. Okay. So we'll have -- we'll
10 figure out maybe on -- I'll look at my calendar. But one of
11 the afternoons, Wednesday afternoon, maybe, we'll have an
12 instruction conference just to make sure that we've got
13 everything set.

14 Okay.

15 **MR. VIEIRA:** Could we potentially set a date to
16 receive a witness list and exhibit list from the defense since
17 those have not been produced or provided yet.

18 **THE COURT:** Well, so, I gave you March 23 for
19 documents that hadn't been produced. Which I think goes both
20 ways. So if you've got anything.

21 **MS. MOEEL:** Including a witness list, Your Honor?

22 **THE COURT:** Yeah, including a witness list. We know
23 what this case is. So I don't think there would be any
24 surprises.

25 **MS. MOEEL:** Okay.

1 **THE COURT:** All right. Anything else?

2 **MS. MOEEL:** No, Your Honor.

3 **MR. VIEIRA:** (Nod negatively.)

4 **THE COURT:** Mr. Lopez, if you've been tracking all of
5 this you know sort of the shape of the case.

6 **THE DEFENDANT:** Yes.

7 **THE COURT:** Okay. All right. So I will see you on
8 the 2nd. If there's a reason that we need to get together on
9 the 29th because of the other acts or the transcripts or
10 anything like that, let me know. Otherwise, we'll deal with it
11 as it comes.

12 **MS. MOEEL:** Great. Thank you, Your Honor.

13 **THE COURT:** Thanks very much.

14 **MR. VIEIRA:** Would the Court want a pre-trial
15 conference for the second trial now?

16 **THE COURT:** I think we can talk about -- what are you
17 thinking of, Mr. Vieira. What more would we want to go
18 through?

19 **MR. VIEIRA:** I guess on that one there was just an
20 evidentiary issue with regard to some of the evidence in that
21 case that I was going to raise, but it's not necessarily
22 something that would need to be done now. It was just going to
23 be the government's position that -- the government received
24 toll records for the telephone that was used to make the call
25 that made the threats. And we were -- the government was just

1 going to argue in the hopes of avoiding having to call a
2 custodian of records that because those are computer-generated
3 toll records that were not created by a person, they actually
4 are non-hearsay and would be admissible as such. And I
5 actually have a Ninth Circuit case that, basically, says that
6 not for toll records but says that for computer-generated
7 information.

8 **THE COURT:** Okay. Why don't you do like a one-page
9 brief that says just what you said and cites the case. And
10 then respond, as well, within a week from now. Got plenty of
11 time. Within a week of the time that it's filed. Whenever it
12 gets filed. And we can deal with that.

13 **MR. VIEIRA:** Otherwise -- it's a very small cell phone
14 company so it's not as easy as calling up T-Mobile, for
15 instance.

16 **THE COURT:** So actually since we're doing this, why
17 don't we say that on Friday, March 30, I'm going to reserve a
18 hearing time at 10:00. And if either party wants to address
19 any trial-related issues they should just notify Ms. Davis.
20 And if I want to see you then I will notify you.

21 **MR. VIEIRA:** Okay.

22 **MS. MOEEL:** Great. Thank you, Your Honor.

23 **MR. VIEIRA:** Will the Court want additional new
24 witness/exhibit/jury instructions for the new --

25 **THE COURT:** The only thing I care about is that you've

1 shared with the defense what it is that you're doing. But I
2 don't need anything more than what I've got at the moment.

3 **MR. VIEIRA:** Okay. Thank you.

4 **MS. MOEEL:** Thank you, Your Honor.

5 **THE COURT:** Great. Thank you. Thank you, Mr. Lopez.

6 ---oOo---

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Tuesday, March 20, 2018

//Vicki Eastvold

Vicki Eastvold, RMR, CRR
U.S. Court Reporter